

Re SALOMA CO.; Ex parte, IPOH RADIO CO. A

[O. Bk. J. (Azmi J.) July 16, 1962]

[Ipoh — In Bankruptcy No. 22 of 1962]

Bankruptcy — Application to set aside bankruptcy — Notice — Judgment debt as specified in notice reduced at time notice became effective by part payment by debtor — Whether notice defective — Bankruptcy Ordinance, 1959, s.3(2), proviso (ii) — Bankruptcy Rules, 1921, rr.13, 92(2) and 93.

In this application the judgment debtor sought to set aside a bankruptcy notice which had been served on him by way of substituted service by an Order of Court dated May 16, 1962. The notices were posted on the Notice Board of the Supreme Court on May 16, 1962 and on the premises in question on May 23, 1962 and service was deemed to take effect 5 days after the last act of posting, i.e. May 29, 1962.

He alleged that he had on May 12, 1962 paid a sum of \$700 towards the judgment debt. This was admitted by the judgment creditor but the creditor maintained that there was a stipulation that unless he received the balance of the judgment debt the bankruptcy notice would remain in full force. The debtor failed to pay the balance due.

Held: the bankruptcy notice was defective and should be set aside.

Cases referred to:—

- (1) *In re Child, Ex Parte Child* [1892] 2 Q.B. 77.
- (2) *In re a Debtor* [1908] 2 K.B. 684.

BANKRUPTCY APPLICATION.

Ng Chee Kong for the applicant.

Leong Hoi Kow for the judgment creditors.

Azmi J.: This is an application by a judgment debtor to set aside the Bankruptcy Notice under section 3(2) proviso (ii) of the Bankruptcy Ordinance, 1959, which had been served on him by way of substituted service by order of this Court made on the 16th May, 1962. The notices were posted on the Notice Board of the Supreme Court on the 16th May, 1962 and on premises No. 35, Jalan Kuala Kangsar, on the 23rd May, 1962, and the order of the Court declared that such service be deemed to be given and effective 5 days after the last act of such posting. In other words, the effective date was the 29th May, 1962.

According to the affidavit of the debtor, he had on the 12th day of May, 1962, paid a sum of \$700 towards the judgment debt. He, therefore, maintained that the Bankruptcy Notice was defective.

Mr. Ng Chee Kong, for the applicant, cited to me the case of *In re Child, Ex Parte Child*.⁽¹⁾

The judgment creditor admitted the payment of the \$700 to him but maintained that there was a stipulation that unless he received the balance of the judgment debt the Bankruptcy Notice would remain in full force. The judgment debtor failed to pay the balance due.

Mr. Leong Hoi Kow, for the judgment creditor, said that the notice was good at the date of the notice in that it was not stated by the judgment debtor that the payment of the \$700 was in full settlement and since the payment of the \$700 was not a full settlement, therefore, the Court should not set aside the notice. He referred me to rule 92 of the Bankruptcy Rules, sub-rule (2) and also rule 13 where it says that this application should be made by way of Motion supported by affidavit. I think I can dispose of this argument made by Mr. Leong, as I understood him, by referring to rule 92(2) of the Bankruptcy Rules where it says that the judgment debtor, if he has a counterclaim or set-off, which equals or exceeds the amount of the judgment debt, he must within the time specified in the notice file an affidavit to that effect with the Registrar, and rule 93 goes on to say that the filing of such an affidavit shall operate as an application to set aside a bankruptcy notice and thereupon the Registrar shall fix a date for the hearing of the application. I would, therefore, proceed to consider Mr. Ng's submission.

In this case, it is obvious that at the time when the service of the bankruptcy notice became effective, that is, on the 29th May, 1962, the amount due on the judgment debt had been reduced by the payment of \$700 made on the 12th May, 1962. As Vaughan Williams J. said in *In re Child* at page 81 *supra*:—

"It can scarcely, I think, have been the intention of the legislature that a judgment debtor should be liable to be served with a bankruptcy notice claiming from him a sum which is not due, inasmuch as it has been paid by him and accepted by the judgment creditor in reduction of the judgment debt."

and further on:

"I think they shew a clear intention that a judgment creditor, in serving a bankruptcy notice, shall deal with a sum which is really due in respect of the judgment debt, and with that sum alone."

In *In re a Debtor*,⁽²⁾ the Court of Appeal held that the mistake in the amount of interest was not a formal defect or irregularity which could be remedied under section 143 of the Bankruptcy Act, 1883, and that the bankruptcy notice was bad. In that case a bankruptcy notice required the payment of a certain sum as being the balance claimed to be due on a final judgment. In the margin of the notice there was a statement of how the balance was arrived at, namely, debt so much, interest so much, amount credited to debtor so much. It appeared that the interest was wrongly calculated and that the notice claimed £1.5s.6d. in excess of the amount due from the debtor. At page 687, Cozens-Hardy M.R. said:—

"The amount in the bankruptcy notice was not due. There was a mistake in the calculation of interest..... It is said that that is a formal defect which can be set right under section 143, sub-section 1, of the Bankruptcy Act, 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him.....It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of section 143."

In the circumstances, I would say that the bankruptcy notice was defective and should be set aside.

The judgment creditor will pay the costs of this application.

Order accordingly.

LEE HENG & CO. v. C. MELCHERS & CO.

[C. A. (Thomson C.J., Hill and Good J.J.A.)
September 18, 1962]

[K.L. — F.M. Civil Appeal No. 28 of 1962]

Contract — Delivery of goods of a different brand from those ordered — Action for damages for breach of warranty — Measure of damages — Date to be used for assessing market values for measuring damages — Contracts (Malay States) Ordinance, 1950, s.74.

Sale of Goods — Breach of warranty — Damages — Assessment of.

This was an action for breach of warranty of a contract under which the defendants were to supply shovels to the plaintiffs bearing the brand "Spatenmann". The shovels actually supplied were of another brand.

The learned Magistrate holding that there was a breach of warranty assessed damages for the plaintiffs on the basis of the difference between the market value of the goods supplied and the market value of the goods ordered, both values being those as on the date of delivery of the goods. This decision was reversed in the High Court on the finding that the evidence disclosed no breach of warranty. On appeal,

Held: there was a breach of warranty and that the damages were correctly assessed by the learned Magistrate.

Per Thomson C.J.: "There is no corresponding sub-section in section 59 of our Sale of Goods Ordinance [to section 53(3) of the Sale of Goods Act, 1893, on the measure of damages in such cases]. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. This is set out in section 74 of the Contracts (Malay States) Ordinance which is the same as section 73 of the Indian Contract Act which was held by the Privy Council in *Jamal v. Dawood* (1) to be merely declaratory of the English common law relating to damages.

Cases referred to:—

- (1) *Jamal v. Dawood* 43 I.A. 6.
- (2) *Engell v. Fitch* (1868-9) L.R. 4 Q.B. 659, 669.
- (3) *Rodocanachi v. Milburn* 18 Q.B.D. 67.
- (4) *Williams v. Agius* [1914] A.C. 510.
- (5) *Slater v. Hoyle* [1920] 2 K.B. 11.
- (6) *Heskell v. Continental Express Ltd.* [1950] 1 All E.R. 1033.

COURT OF APPEAL.

K. L. Devaser for the appellants.

Peter Mooney for the respondents.

Thomson C.J.: I have had the advantage of reading the judgment of Hill J.A. I agree with what he says and wish to add a few words only of my own.

On the evidence I do not think there is the slightest room for doubt that what the respondents agreed to sell and what the appellants agreed to buy was shovels the metal portion of which was of and bore the "Spatenmann" brand. What was supplied was shovels the metal portion of which was of another brand and there was thereby a breach of contract.

In the circumstances it was for the purchaser to make his election. He could repudiate the contract, refuse to accept delivery, and sue for damages, or he could accept delivery and sue for damages as for breach of warranty. He elected to follow the second of these courses.

The measure of damages in such a case is normally the difference, if any, between the market value of the goods supplied and the market value of the goods ordered, both values being taken as at the date of delivery. This is not because of anything contained in sub-section (3) of section 53 of the Sale of Goods Act, 1893, for there is no corresponding sub-section in section 59 of our Sale of Goods Ordinance. The law on the subject in this country is the general law relating to compensation for loss caused by breach of contract. That law is set out in section 74 of the Contracts (Malay States) Ordinance which is the same as section 73 of the Indian Contract Act, which was held by the Privy Council in the case of *Jamal v. Dawood* (1) to be merely declaratory of the English common law relating to damages.

The English rule is thus stated by Kelly C.B. in the case of *Engell v. Fitch*:—(2)

"The measure of damages is the difference between the contract price and the value at the time when the contract was broken."

That case related to a contract for the sale of land. From such cases as *Rodocanachi v. Milburn* (3) and *Williams v. Agius* (4) it is clear that where the contract relates to goods for which there is a market the measure of damages is the difference between the contract price and the market price at the contracted date of delivery. From the case of *Slater v. Hoyle* (5) it is clear that the purchaser is not entitled to compensation for loss of profit from a sub-contract for resale unless the sub-contract was known to the vendor at the time of the original contract, but the facts relating to such a sub-contract may *pro tanto* be looked at as evidence having a bearing on the question of market value (see *Heskell v. Continental Express Ltd.* (6)).

In the present case the subject matter was 100 dozen shovels and the contract price (which was paid) was \$33.54 per dozen. Delivery took place about 28th October, 1959. Regarding the market price there was evidence that in July one of the plaintiffs' customers in Kota Bharu was